(8)

No. 90-6105

In The

Supreme Court of the United States

October Term, 1991

JOHN H. EVANS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONER

C. MICHAEL ABBOTT
(Appointed by this Court)
100 Peachtree Street, N.W.
Suite 200
Atlanta, Georgia 30303
(404) 525-6666

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. Respondent's Argument Regarding "Plain Error"

The objections made by Petitioner to the charge to the jury in the district court are characterized by Respondent as follows:

> When the court entertained objections to the jury charge, petitioner focused on the instruction that provided that "[i]f a public official demands or accepts money in exchange for specific requested exercises of his official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution." J.A. 26. Petitioner objected to the language "in exchange for specific requested exercises of his official power," explaining that, in his view, "it improperly focuses on the motives of the contributor instead of the intent of the public official." *Ibid*. Petitioner contended that the instruction would have been clearer "if it were stated that the money was accepted with an agreement to perform official action as to – in place of the language 'Requested exercises of official power.' " *Ibid*. Petitioner made no other relevant objections to the jury charge. The district court declined to modify the charge. Br., pp. 15-16.

From this statement, Respondent goes on to argue that "petitioner did not object to the instructions on the ground that they failed adequately to set forth the requirement of inducement. Because of petitioner's failure to object on that ground, petitioner's challenge to the 'inducement' instructions must be reviewed under the plain error standard." Br., p. 34.

Respondent's *Statement* relating to the objections made by Petitioner to the charge is incomplete and Respondent's conclusion that a plain error standard is appropriate is erroneous.

By way of background, the charge conference in the district court was not taken down by a court reporter. At the end of this lengthy (5½ week) trial, the court excused the jury for a day between the closing of evidence and the argument and charge. *See* R40-76-79, 164. Throughout the trial all proceedings, including bench conferences, were routinely recorded. During that off day, the charge conference was held but, inexplicably and without notice to counsel, no court reporter was summoned. Therefore, the only recorded objections are those made after the court's charge to the jury the following day. *See objections at* R41-150-53.

However, even without a transcript of the charge conference the record is ample that counsel for Petitioner-defendant did indeed object to the lack of a demand or solicitation in the charge as it related to inducement.

First, the Eleventh Circuit Pattern Instructions use the word "inducement" in their offense instructions on extortion, including extortion under color of official right. *Pattern Jury Instructions, Criminal Cases,* pp. 168-69 (Eleventh Circuit, West Ed. 1985). Counsel submitted written requests to charge which requested the pattern charge as it related to extortion under color of official right. *See* R3-74, Request 12. That portion of the pattern charge reads, in pertinent part, as follows:

> So if a public official misuses his office by *threatening* to take or withhold official action for the wrongful purpose of inducing a victim to part with property, such a *threat* would constitute extortion even though the official was already duty bound to take or withhold the action in question. Id. at 169 (emphasis supplied).

However, the district court bowdlerized the pattern charge by eliminating the requirement of an affirmative "threat." The watered-down pattern charge given by the Court was as follows:

> So, if a public official *agrees* to take or withhold official action or (sic) the wrongful purpose of inducing a victim to part with property, such *action* would constitute extortion even though the official was already duty-bound to take or withhold the action in question. (emphasis supplied) R41-136-37.

Thus, petitioner requested and the court refused to give the pattern charge as written.

Second, petitioner had also requested the following language in its written requests to charge filed with the court, citing, *inter alia, United States v. Dozier,* 672 F.2d 531 (5th Cir. 1982):

> The government must prove beyond a reasonable doubt that money received by John Evans was *solicited* and received unlawfully, that is wrongfully under color of official right. (emphasis supplied). R3-74, Request 15.

Third, consistent with petitioner's theory that he must be shown to have conditioned his support upon receiving a contribution, Petitioner also requested, in its "theory of the defense" charge, the following language:

> Evans contends that *he never threatened to withhold his support* if he did not receive a campaign contribution and that he would have rendered the same assistance to Hawkins regardless of the size of any campaign contribution or whether he received any campaign contribution at all. (emphasis supplied). R3-74, Request 19.[1]

The notion of a requirement of conditioning support upon the payment of a contribution is central to petitioner's position and was emphasized by the court in *United States v. Dozier*:

> At the very least, elected officials are, and have been, on notice that any public officer, elected or otherwise, who makes performance (or nonperformance) of an official act contingent upon payment of a fee – whether or not the fee actually is paid or the act actually performed – is guilty of extortion "under color of official right." *Id.* at 540.

Fourth, leaving aside the charge conference for which there is no record, in objections made after the court's charge to the jury, Petitioner continued to reaffirm his position, again citing *United States v. Dozier, supra*:

> The second exception as to the definition of "campaign contributions" in the Court's charge, the language that says that "if a public official demands or accepts money in exchange for specific requested exercises of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of

[1] Although the district court gave petitioner's request, the court made clear to the jury that these were the contentions of petitioner, not the law as given by the court. R41-133-35.

> whether the payment is made in the form of a campaign contribution." *We believe the language "in exchange for specific requested exercises of his official power" is inconsistent with the holding in Dozier, the Fifth Circuit case in 1982, 672 Fed.2d 531; that it improperly focuses on the motives of the contributor instead of on the intent of the public official, or the recipient, and the page references were 537 and 542 of the Dozier opinion.* (emphasis supplied).
>
> We think the language should have been clearer, if it were stated that the money was accepted with an agreement to perform official action as to – in place of the language "requested exercises of official power."

The Court: All right, sir. Yes, I'm familiar with Dozier. R41-152-53.

The thrust of petitioner's argument was language in *United States v. Dozier* which correctly embodied petitioner's position. A review of the two referenced page citations to the *Dozier* case articulated by petitioner's counsel demonstrates that each refers to the twin focus of petitioner – the articulation of a demand or solicitation and the need to emphasize the intent of petitioner rather than the motivation of the undercover agent. The specific reference to page 537 of the opinion in *United States v. Dozier* by petitioner-defendant's counsel reveals the following language:

> Where the accused is or was an elected official authorized under our system to solicit contributions, however, a fine line may separate a request for support from the sale of a favor. As a sister court has observed, *"No politician who*

> *knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation.*" (citation omitted) Consequently, we do not seek to punish every elected official who solicits a monetary contribution that represents the donor's vague expectation of future benefits. We must, nevertheless, discover and penalize *those who*, under the guise of requesting "donations," *demand money* in return for some act of official grace. *United States v. Dozier*, 672 F.2d 531, 537 (5th Cir. 1982) (emphasis supplied):

The second page reference by petitioner-defendant's counsel, page 542 of the opinion in *Dozier*, is as follows:

> The case before us . . . involves an extortion charge. The emphasis is on the defendant's own motives rather than on his perception of a potential contributor's motive. The issue is whether Dozier "knowingly and willingly" induced some of his constituents to pay him money *by threatening to take or withhold official action*[2], *not whether he accepted money as contributions with "knowledge" of a donor's corrupt intent*. *United States v. Dozier*, 672 F.2d 531, 542 (5th Cir. 1982) (emphasis supplied).

Set in context, Petitioner's objections are right on the mark and the citations given clearly reflect the position taken by Petitioner with which the Court was already

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[2] The italicized language ending with the word "action" is identical to a portion of the Eleventh Circuit pattern instruction requested by Petitioner but modified substantially by the district court. Apparently, *United States v. Dozier supra*, was used as a reference for the Eleventh Circuit pattern charges.

familiar. By the time those citations were laid on the record after the court had given its charge, the district court had the benefit of the charge conference and petitioner's written requests to charge and had determined that it was not going to give the charges requested by Petitioner. The Court did not discuss exceptions to the charge with either the government or the Petitioner-defendant after the charge was given apparently because it was familiar with each party's position.

Contrary to what Respondent asserts, Counsel's objections to the district court taken as a whole are identical to the arguments raised in this court. It cannot be argued in good faith that a plain error standard should apply here. The fact that the Court intentionally changed the pattern charge so that it required only an "agreement" by petitioner rather than a "threat" to take or withhold official action in order to induce a victim to part with money, as the pattern charge provides, is clear evidence that the court had considered and rejected petitioner's oral requests and argument in the charge conference and petitioner's written requests of the pattern charge and a charge requesting "solicitation." The court went on to instruct the jury in language which became the focal point of the issue here and ironically, it is likely that the charge given by the court came from language found in *United States v. Dozier, supra,*[3] so it is

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[3] The most critical instruction here regarding "inducement" was as follows:

> [I]f a public official demands or accepts money in exchange for specific requested exercise (sic) of his

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hardly surprising that the court responded on the record to counsel after petitioner's objections that the court was "familiar with Dozier." R41-152-53.

It is in that context that one must view petitioner's objections on the record after the charge and his reference to specific pages within *United States v. Dozier.* One can feel confident upon reviewing the complete record that the Court was conversant with *United States v. Dozier, supra,* and with the issues raised by petitioner, a proposition directly at odds with the government's argument of plain error. It is not surprising that the Assistant United States Attorney who tried this case in the district court and who also represented the government on appeal in the Eleventh Circuit did not advocate the plain error argument now suggested by the government for the first time.

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> or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution. R41-141.

It appears that language from the charge was adapted from *dictum* found in *United States v. Dozier,* 672 F.2d 531 (5th Cir. 1982], wherein the Fifth Circuit was discussing defendant Dozier's challenge to the Hobbs Act on grounds of vagueness:

> If this technical meaning of the [Hobbs] Act is inadequate to apprise an official of ordinary mental competence that *he may not demand or accept money in return for requested exercises of his official power,* judicial elaborations offer assistance. *Id.* at 539 (emphasis supplied).

II. The Statutory Language

The government argues that the statutory language should be read so that the word "induced" modifies only what is referred to as "coercive extortion" or the obtaining of property by actual or threatened force, violence or fear, acknowledging that "[s]ome courts have read the phrase 'under color of official right' to modify the word 'induced' rather than the word 'obtaining,' and thereby to import a requirement of inducement into the official extortion portion of the definition." Br., pp. 21-22.

It would be more accurate to say that most courts (and commentators[4]) including those espousing the "majority view" read the word "induced" as being modified by the official extortion clause, as well as the coercive extortion clause, including the court below. *See United States v. Evans,* 910 F.2d 790, 796-97 (11th Cir.), cert. granted *sub nom Evans v. United States,* 111 S.Ct. 2256 (1991). Only one case cited by Respondent, *United States v. Jannotti,* 673 F.2d 578, 594 (3d. Cir.) (*en banc*), cert. denied, 457 U.S. 1106 (1982), parses the statutory language as Respondent suggests. In doing so, without discussing the issue of "parsing", the en banc court relies on two other third circuit cases, one also sitting en banc, both of which viewed the issue differently than *Jannotti,* approving language which places "under color of official right" as modifying "induced." *See United States v. Kenny,* 462 F.2d 1205, 1229 (3d Cir.), cert. denied, 409 U.S. 914

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[4] *E.g.,* Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act,* 35 U.C.L.A. L. Rev. 815, 837 (1988).

(1972); *United States v. Mazzei*, 521 F.2d 639, 645 (3d Cir.) (*en banc*), cert. denied, 423 U.S. 1014 (1975).[5] Of the remaining cases cited by Respondent as representing the circuits which subscribe to the "majority view," only *United States v. Garner*, 837 F.2d 1404, 1423 (7th Cir. 1987), cert. denied, 486 U.S. 1035 (1988) states, without elaboration, that, "inducement is not an element of extortion in this circuit," but the reader is left guessing as to exactly how the Seventh Circuit reached that conclusion. For example, in oft-quoted (although uninstructive) language, *United States v. Braasch*, 505 F.2d 139 (7th Cir. 1974), also from the Seventh Circuit plainly speaks of public officials "inducing" payments[6] and is itself cited by two "majority view"

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[5] The seminal case of *United States v. Kenny, supra*, approved a district court instruction which read:

> The term 'extortion' means the obtaining of property from another with his consent induced either by wrongful use of fear or under color of official right. *Id.* at 1229.

In *United States v. Mazzei, supra*, the en banc third circuit stated:

> We conclude that Kenny properly read the statute and that a showing of the inducement of payments, "under color of official right" may replace proof of the coercion of "force, violence or fear" in a Hobbs Act prosecution. *Id.* at 645.

As many of these cases do, the court in *Mazzei* looked to the defendant's position as a public official for the "inducement." *Ibid.*

[6] *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974) states:

> It matters not whether the public official *induces* payments to perform his duties or not to perform his

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cases noted by Respondent. See, *United States v. French*, 628 F.2d 1069, 1074 (8th Cir.), cert. denied, 449 U.S. 956 (1980); *United States v. Butler*, 618 F.2d 411, 418 (6th Cir.), cert. denied, 447 U.S. 927 (1980). The case of *United States v. Spitler*, 800 F.2d 1267, 1274-75 (4th Cir. 1986), cited as representing the majority view, does not reveal how it views "inducement" as it relates to the parsing of the statute even though it found the defendant "coercively demanded" the items in question, and the remaining three cases cited by Respondent all cite the power of the office as the "inducement" for the "under color of official right" clause. See *United States v. Williams*, 621 F.2d 123, 124, 126 (5th Cir. 1980), cert. denied, 450 U.S. 919 (1981); *United States v. Hall*, 536 F.2d 313, 320 (10th Cir.), cert. denied, 429 U.S. 919 (1976); *United States v. Hathaway*, 534 F.2d 386, 393 (1st Cir.), cert. denied, 429 U.S. 819 (1976).

Finally, although the government is not required to take a consistent approach in these matters, one notes with interest the fact that the parsing-of-the-statute argument advocated here was apparently not made by the government last term in its brief in *McCormick v. United States*, 111 S.Ct 1807 (1991) where the government argued that "[e]xtortion is ordinarily understood to mean the act of obtaining money by consent, where the consent is *induced* by a threat of some kind of injury in the future"

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> duties, or even, as here, to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951. (emphasis supplied)

(citation omitted) and also that, "[t]hus, extortion under color of official right was understood in New York (and therefore presumably by the Congress that adopted New York law as the basis for the Hobbs Act) to apply to the *inducement* of payoffs by an elected official in return for his services." *Brief For The United States*, pp. 23, 20 (emphasis supplied).

In summary, for the most part, even those representing the "majority view" agree that the natural reading of the statute is "the obtaining of property from another, with his consent, induced . . . under color of official right." Petitioner also agrees with the government's position as stated in their brief in *McCormick v. United States, supra*, that, by definition, the ordinary understanding of "extortion", whether under color of official right or otherwise, has to do with one party inducing another to part with property. That historical understanding strongly suggests that if Congress had a different interpretation when it enacted the Hobbs Act, it would have said so.

III. Petitioner Has Never Claimed That A Conviction Under The Statute Requires A Public Official to Initiate The Transaction.

In its brief, the government states:

> Although petitioner alleges that the instructions allowed the jury to convict on the basis of the "passive acceptance of a contribution," Br. 24, the focus of his argument is actually on the claim that the instructions did not require the jury to find that he *initiated* the transaction." Br. 32.

Petitioner does not now and has never contended that the instructions of the court in a Hobbs Act case require the jury to find that Petitioner initiated, as opposed to induced, the transaction.

Respectfully submitted,

/s/ C. Michael Abbott
C. Michael Abbott
(Appointed by This Court)
100 Peachtree Street, N.W.
Suite 200
Atlanta, Georgia 30303
(404) 525-6666
Counsel for Petitioner